Supreme Court, U.S.
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No. 09-723

In The Supreme Court of the United States

AURELIUS CAPITAL PARTNERS, LP, et al.,
Petitioners,

v.

THE REPUBLIC OF ARGENTINA, et al.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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BRIEF IN OPPOSITION TO CERTIORARI

Respondent the Republic of Argentina (the "Republic") respectfully requests that this Court deny the petition for writ of certiorari filed by petitioner-plaintiffs Aurelius Capital Master, Ltd., Aurelius Capital Partners, LP and Blue Angel Capital I LLC (the "Aurelius Plaintiffs" or "Aurelius") and joined by certain other plaintiffs, including plaintiffs EM Ltd. and NML Capital, Ltd. ("EM/NML").[1]

SUMMARY OF THE ARGUMENT

The petition in this case seeks review of a deliberately narrow, fact-specific and uncontroversial decision of the Court of Appeals for the Second Circuit that the Foreign Sovereign Immunities Act ("FSIA" or the "Act"), 28 U.S.C. §1610(a), does not permit a creditor of a foreign state to execute on social security funds held and administered in the United States by private parties for the benefit of the employees and pensioners who contribute them, solely because the state enacts legislation transferring administration of such funds to a state agency and requiring the funds to be repatriated to the foreign state. *See Aurelius*

[1] The Republic submits this brief in opposition to the Aurelius petition for writ of certiorari, dated December 21, 2009 ("Pet."), as well as in response to EM/NML's brief in support of the petition, dated January 11, 2010 ("EM/NML Br."). Although EM/NML are nominally respondents because "[a]ll parties other than the petitioner are considered respondents," Sup. Ct. R. 12.6, the EM/NML plaintiffs were identically situated to the Aurelius Plaintiffs below, and like them, are requesting that certiorari be granted.

Capital Partners, LP v. Republic of Argentina, 584 F.3d 120, 129-31 (2d Cir. 2009) (Wallace, J., joined by Walker, J.); App. 17a-20a.[2] Section 1610(a) provides that attachment or execution is permitted only on "property in the United States of a foreign state . . . used for a commercial activity in the United States." The Second Circuit properly held that plaintiffs could not attach or execute on Argentine social security funds that were undisputedly held and administered by private parties at the time the district court ordered them to be restrained in aid of execution, and that the subsequent enactment of an Argentine law transferring their administration to the state social security agency, which did not use them for any activity in the United States and was required by the legislation to repatriate them to Argentina, did not change this result.

The Second Circuit's decision was compelled by the language of the statute. Section 1609 of the FSIA provides that "the property of a foreign state in the United States shall be immune from attachment, arrest and execution except as provided in sections 1610 and 1611." Section 1610(a) in turn provides that only property of the foreign state "in the United States" and "used for a commercial activity in the United States" is subject to execution or attachment in aid of execution (if, in addition, one of the seven specific exceptions to immunity in Section 1610(a)(1)-(7), which includes a waiver of execution immunity by

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[2] The Honorable Sonia Sotomayor was a member of the court of appeals' panel before she was appointed to this Court on August 8, 2009. The two remaining members of the panel issued the opinion unanimously. *See* 28 U.S.C. § 46(d), 2d Cir. Local Rule 0.14(b).

the state, applies).[3] Property held by private persons when it is restrained or attached in aid of execution obviously does not satisfy the statutory test, nor does property transferred to the administration of a state agency that does not use it all, and is legally obliged to repatriate it outside of the United States (even leaving apart the presumed legal separateness of the agency from the state itself, an issue the court of appeals did not reach).

There is no circuit split on this issue, nor do petitioners claim one. *See, e.g.*, EM/NML Br. at 7. Rather, the petition asks the Court to decide two convoluted "questions presented," that are self-evidently unworthy of a writ of certiorari. Pet at i-iv. Petitioners' first question – concerning whether Argentine Law 26,425 transferred the social security funds to the Republic "in situ" in New York – is one that they did not preserve below. This new argument is also at direct odds with the argument that petitioners did raise below – that repatriation to Argentina was a commercial use in the United States – an argument the court of appeals expressly rejected.

Petitioners' second question, which deals with the propriety of the district court's original restraining orders, is one that the court of appeals explicitly held

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[3] Section 1610(b) provides for a different regime in respect to the attachment in aid of execution and execution of property in the United States of agencies or instrumentalities of the foreign state, and Section 1611(b) provides for heightened immunity for, *inter alia*, central bank and military property. These sections are inapplicable here, where the plaintiffs themselves claimed that the property sought to be attached and executed was the property of the Republic of Argentina, the state itself. *See* App. 17a-18a.

it need not reach. App. 22a. Even if the issues identified by the petition had any merit – which they do not – under this Court's well-established practices, the Court does not review issues that were not properly raised below, or that the court of appeals found unnecessary to address.

FACTUAL BACKGROUND AND PROCEEDINGS BELOW

A. The Republic's Economic Crisis And The Sovereign Debt Restructuring Process

Between 1998 and 2002, the Republic experienced the worst economic, social and institutional crisis of its modern history, marked by an enduring recession, record levels of unemployment and poverty and lack of access to the international capital markets. *See, e.g.*, Paul Blustein, AND THE MONEY KEPT ROLLING IN (AND OUT): WALL STREET, THE IMF, AND THE BANKRUPTING OF ARGENTINA 1 (2005) (describing collapse of Argentine economy in 2001 as "one of the most spectacular in modern history"). As a result of a series of negative external shocks (i.e., the Russian debt default of 1998, the Brazilian currency devaluation of 1999, a decline in the prices of Argentina's exports and rising international interest rates), the Argentine state was essentially bankrupt. With its economy in ruins, the country suffered social and political turmoil: riots in the streets of Buenos Aires left dozens dead and four presidents resigned within a two-week period. Blustein, *supra*, at 1.

By the end of 2001, this crisis made it impossible for the Republic to service its overwhelming debt burden – some $80 billion in public external debt alone

– while maintaining basic governmental services necessary for the health, welfare and safety of the Argentine population. *See, e.g.*, Ross P. Buckley, *The Bankruptcy of Nations: An Idea Whose Time Has Come*, 43 Int'l Law. 1189, 1196 (2009) (describing Argentina's economic crisis: "The living standards of over one-half of the Argentine people fell below the poverty line, and over a third could not afford basic food. Children were fainting in class from hunger, regularly. Adults were rioting and breaking into supermarkets, regularly, in search of food. UNICEF Argentina was concerned that stunted growth and reduced mental capacities would be the long-term consequence of this economic crisis for millions of the nation's children."). "[U]nable to service its debt," the Republic was forced to defer interest and principal payments to its bondholders. Panel of Independent Advisors, *Economic and Financial Issues Facing Argentina*, IMF News Brief No. 02/80, July 29, 2002, ¶ 1, *available at* http //www.imf.org/external/np/sec/nb/2002/nb0280.htm. The "refus[al]to pay" external debt under these extreme circumstances was not a "recalcitrant" decision by the Republic not to meet its obligations, as petitioners charge. Pet 4. Just as the United States Constitution "is not a suicide pact," *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963), neither were the terms of the Republic's agreements with its external debt holders. Like many nations over the course of history that have had to restructure their debt in times of economic crisis, including the United States in the early days of the Constitution, *see generally* Forrest McDonald, ALEXANDER HAMILTON: A BIOGRAPHY 163-88 (1979), the Republic was forced to seek restructuring of both its external and internal public debt

Of course there is no bankruptcy regime for insolvent states, so the Republic's external debt restructuring was necessarily on an entirely voluntary basis. The Republic did not "repudiate" that debt EM/NML Br. at 1. Instead, consistent with United States government policy favoring the orderly and consensual restructuring of sovereign debt, the Republic restructured its unsustainable debt in 2005 through a global exchange offer in which participating bondholders exchanged old, nonperforming bonds for new, performing bonds with lower interest rates, reduced principal, and/or longer maturities The exchange offer was extended to all beneficial owners of eligible bonds on the same terms and reflected the Republic's commitment to treat its private creditors equitably.[4] Approximately $62.5 billion in principal amount, or over 76% of the aggregate eligible debt, was tendered in the exchange offer, making it the largest sovereign debt restructuring in history.

B. Petitioners Chose Not To Participate In The Republic's Debt Restructuring

The Aurelius Plaintiffs, like other litigants against the Republic who did not enter the restructuring, are entities that are in the business of buying distressed sovereign debt in order to speculate in litigation

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[4] The Republic's announcement that it would not resume payments on non-tendered bonds was not "recalcitrance." Rather, it was a critical ingredient to the success of the exchange offer, as participating bondholders would not agree to incur substantial "haircuts" on their holdings if there were a possibility that the Republic would offer non-tendering bondholders a more generous arrangement, much less pay them in full

against the issuing states.[5] Aurelius acquired beneficial interests in Republic bonds at a deep discount well after the Republic suspended payments on its unsustainable external debt in December 2001, and even after the Republic's 2005 exchange offer and announcement that it would not resume payments on non-tendered bonds. Aurelius's business strategy seeks to take advantage of the fact that, as noted above, insolvent sovereigns, unlike private borrowers, cannot invoke the protection of a bankruptcy regime; the Republic has no recourse to an automatic stay of litigation or protection from enforcement procedures as a private debtor would, and interest on judgments against the Republic continues to run indefinitely

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[5] These entities are commonly known as "vulture funds." *See, e.g.*, Jonathan C. Lippert, Note, *Vulture Funds: The Reason Why Congolese Debt May Force a Revision of the Foreign Sovereign Immunities Act*, 21 N.Y. Int'l L. Rev. 1, 1, 27 (2008). EM/NML are also off-shore vulture funds who, consistent with their chosen business strategy to litigate against financially distressed states, acquired beneficial interests in Republic bonds at a deep discount immediately before and after the Republic suspended payments on its unsustainable external debt in December 2001. *See also CIBC Bank & Trust Co. (Cayman) Ltd. v. Banco Central do Brasil*, 886 F. Supp. 1105, 1107-08 (S.D.N.Y. 1995) (describing attempt to interfere with Brazil's debt restructuring by owner of EM), *see also Elliott Assocs., L.P. v. Republic of Peru*, 12 F. Supp. 2d 328, 331-32, 355-56 (S.D.N.Y. 1998) (describing sovereign debt litigation by parent of NML, and holding that its acquisition of Peru's defaulted debt violated New York champerty law), *rev'd sub nom., Elliott Assocs., L.P. v. Banco de la Nacion*, 194 F.3d 363, 381 (2d Cir. 1999) (holding that creditor did not violate champerty law); G. Mitu Gulati & Kenneth N. Klee, *Sovereign Piracy*, 56 Bus. Law. 635, 635-36 (ABA Publ'ns Feb. 2001) (describing attachment by parent of plaintiff NML of payments to be made by Peru on restructured debt).

rather than stopping on the date of a bankruptcy filing.

Because the business strategy of Aurelius and other professional plaintiffs that have brought suit against the Republic depends upon aggressive litigation, they have not surprisingly engaged in a series of previous attachment and execution efforts against the Republic. As the Second Circuit noted, App. 5a, courts have rejected the vast majority of these efforts. *See, e.g.*, *Capital Ventures Int'l v. Republic of Argentina*, 280 F. App'x 14, 15 (2d Cir. 2008) (affirming denial of attachment of funds held at the Federal Reserve Bank of New York in which the Republic had no interest), *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 475-76 (2d Cir 2007) (upholding vacatur of attachment and restraint of Argentine central bank's funds), *cert denied*, 128 S. Ct. 109 (2007); *Colella v Republic of Argentina*, No. C 07-80084 (WHA), 2007 WL 1545204 (N D. Cal May 29, 2007) (vacating attachment of Argentina's presidential airplane); *NML Capital, Ltd. v Republic of Argentina*, No. 04-cv-0197-CKK (D D C. Aug 3, 2005) (quashing writs of attachment of the Republic's diplomatic and military property); *NML Capital Ltd. v. Republic of Argentina*, No 02 Civ. 3804 (TPG), 2005 WL 743086 (S.D.N.Y. Mar 31, 2005) (vacating restraining and attachment orders concerning bonds tendered by third parties in the Republic's 2005 exchange offer), *aff'd*, 131 F App'x 745 (2d Cir. 2005).

The Aurelius Plaintiffs repeatedly complain that they have been unable to collect the face value of their claims against the Republic, which they were able to purchase at a deep discount precisely because the debt had been nonperforming for years But no one

"relegated" or "forced" Aurelius to resort to the FSIA's judgment enforcement procedures, Pet. 1, 4; when Aurelius chose to buy defaulted sovereign debt, it knew full well the FSIA's limitations And when Congress crafted the FSIA, it decided to limit the scope of execution on a foreign state's property to a significantly greater extent than it limited the scope of jurisdiction over *in personam* suits against foreign states. *Compare* 28 U.S.C. § 1605 *with id.* §§ 1609-1611; *see Conn. Bank of Commerce v. Republic of Congo*, 309 F.3d 240, 252 (5th Cir. 2002); *Letelier v. Republic of Chile*, 748 F.2d 790, 799 (2d Cir. 1984), *cert. denied*, 471 U.S. 1125 (1985); *see also* H.R. Rep No. 94-1487, at 27 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6626. These execution limits under the FSIA exist precisely because Congress envisaged circumstances in which a foreign state does not, or in the case of Argentina, is unable to, pay outstanding judgments. Aurelius and other plaintiffs' lack of success has been due to the fact that their enforcement efforts have violated the limits of the FSIA

C. Proceedings Below

Plaintiffs turned their sights on the social security assets at issue when the Argentine Congress, responding to the global financial crisis in the fall of 2008, considered legislation to return Argentina's social security system from a regime in which a portion of social security resources were managed by private pension fund administrators, the *Administradoras Fondos de Jubilaciones y Pensiones* (the "AFJPs"), to a system administered in Argentina exclusively by the *Administración Nacional De Seguridad Social* ("ANSES" or the "Administration"). ANSES is the

Argentine social security administration, a decentralized autarchic governmental entity.

In October 2008, before this legislation was enacted – i.e., at a time when the social security funds were being administered by the indisputably private AFJPs – plaintiffs sought, and the district court issued, restraining notices, orders of attachment and writs of execution against property in New York administered by the private AFJPs, based on plaintiffs' claim that the proposed legislation, which required the funds to be repatriated for administration in Argentina, gave the Republic an attachable interest in the property Notwithstanding Aurelius's suggestion to the contrary, the district court immediately authorized plaintiffs to serve all of these orders on the Republic and the New York financial institutions that were purportedly holding the social security funds, and plaintiffs immediately effected such service. *Compare* Pet. 10 ("On March 4, 2009, the District Court . . . authoriz[ed] Petitioners and other creditors for *the first time* to proceed to levy by service of attachment orders and/or writs of execution on the garnishee financial institutions that maintained the restrained investment accounts.") (emphasis added), *with* App. 28a-29a, 63a (district court acknowledging that it signed orders on October 31, 2008 authorizing levy and service of orders of attachment); EM/NML Br. at 2 & n.1 (asserting that NML attached and levied the restrained funds prior to December 9, 2008).[6] The unquestioned *effect* of these

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[6] Aurelius also misstates the procedural history when it claims that the district court did not "attach" the social security funds prior to March 4, 2009 Pet 19a As the record makes clear, and other plaintiffs acknowledge, the district court entered orders of attachment against the social security funds in fifteen cases

orders, however characterized, was to "freeze" these privately-administered funds in the United States, where they remain to this date as a result of the district court's restraints. Neither the private AFJPs nor ANSES, which is entitled to its own claim of sovereign immunity under the FSIA (separate from the Republic) and never waived such immunity, were ever sued, joined, served or found subject to the personal jurisdiction of the district court.

On December 11, 2008, following the passage of the proposed Argentine legislation as Law 26,425, the district court issued its opinion confirming its orders, holding that the Argentine legislation requiring social security funds (wherever located) to be administered by ANSES in Argentina constituted a "commercial activity" by the Republic in the United States. App. 53a. In authorizing plaintiffs to execute upon the social security funds, the district court committed several errors that independently required reversal, including that:

> 1) At the time the initial orders were issued, the assets consisted entirely of social security assets managed by the indisputably private

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against the Republic between October and December 2008. *See* App 63a-66a (district court detailing the orders of attachment issued in pre-judgment cases), EM/NML Br at 2 & n 1. Aurelius's mischaracterization of the record is apparently an attempt to assert priority over other plaintiffs to the social security funds and (erroneously) claim that the court of appeals "inexplicably misunderstood" the procedural posture of the case. Pet 9, 19 n 8. The former issue is irrelevant to the petition and moot in light of the Second Circuit's decision, and the latter claim is meritless. *See* infra Point II

AFJPs for the benefit of Argentine workers and pensioners. October 29, 2008 Hr'g Tr. at 11:1-8 (the district court: "These are not assets of the Republic now. . . . They're assets of private pension funds."). Even plaintiffs recognized that this was fatal to the orders under the basic principle that creditors may restrain only property that belongs to the debtor. Nov 24, 2008 Hr'g Tr. at 7:14-15 ("[EM/NML COUNSEL]: [U]nless at the time the restraints were served they actually had property of Argentina, it's ineffective. It doesn't have continuing life. It never was effective.")

2) Even if the funds had become property of ANSES after Law 26,425 was passed – which they did not because under that Law and other longstanding Argentine law they are administered solely for the benefit of Argentine pensioners and workers – the assets were still not available to creditors of the Republic under this Court's decision in *First Nat'l City Bank v Banco Para El Comercio Exterior de Cuba* ("*Bancec*"), 462 U.S. 611 (1983), which held that agencies and/or instrumentalities of a foreign state such as ANSES are presumptively separate from the state itself. *Id.* at 624-26. The district court acknowledged that, as a matter of Argentine law, ANSES was in fact a separate legal person as "a 'decentralized entity' . . . [that] has the power to manage its own administration and finance, independent of the National Treasury[,] . . . can enter into contracts, sue and be sued, and acquire assets in its own name" App. 33a-34a. It nevertheless held that ANSES was "part of" the

> Republic merely because it performed a "governmental function," App. 49a, a standard that *Bancec* explicitly declined to endorse, 462 U.S. at 634 n.27, and that conflicted with every other decision addressing agency and/or instrumentality status under the FSIA.
>
> 3) Finally, even if ANSES were liable for the debts of the Republic – which it is not – the district court further erred because the property it had attached and on which it ordered execution was not "used for" a commercial activity in the United States by either the Republic or ANSES In fact, neither the Republic nor ANSES had "used" the property at all either before or after the district court's orders against the funds and its opinion confirming them The property was therefore immune from execution under FSIA Section 1610, which requires that executable property of a foreign state be "used for" a commercial activity in the United States by the foreign state. 28 U.S.C § 1610(a).

The Republic, ANSES and the AFJPs appealed the district court's orders to the Court of Appeals for the Second Circuit, which expedited the appeal due to the urgent sovereign measure at stake.

On October 15, 2009, the Second Circuit reversed and vacated the district court's December 11, 2008 decision and "all of the associated orders" for the third reason listed above, finding it unnecessary to reach the other two issues. App. 17a-22a On appeal, plaintiffs had asserted the same "repatriation" argument that they had advanced in the district court. *See, e.g.*, Br.

of Plaintiff-Appellant Aurelius, filed Mar. 18, 2009, at 26-27 (2d Cir.) (arguing that "[t]he District Court properly exercised [its] authority in light of the pending legislation to . . force [the assets'] repatriation to Argentina"); *id.* at 31 (asserting that the Republic had a property interest in the social security funds because Law 26,425 sought to "repatriate the custodial assets to Argentina"). The court of appeals explicitly rejected that argument, holding that the property was immune from execution under FSIA Section 1610 even after the Argentine Congress passed Law 26,425 requiring repatriation:

> The only activity that the Republic had engaged in with regard to the funds at the time that the district court confirmed the Orders was the adoption of a law transferring legal control of the funds from the private corporations to the Administration. As we read "used for a commercial activity," we hold that a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being "used for a commercial activity." A contrary conclusion would essentially nullify the Act's commercial activity requirement in cases involving attachment and execution of a foreign state's property.

App. 20a. This decision both applied a plain reading of the statute, and was in line with precedent from another circuit. *Ministry of Def & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Def. Sys.*, 495 F.3d 1024, 1037 (9th Cir 2007) ("Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the judgment is not subject to attachment under

§ 1610(a)."), *reversed on other grounds by*, *Ministry of Def. & Support for the Armed Forces of the Islamic Republic of Iran v. Elahi*, ___ U.S. ___, 129 S. Ct. 1732 (2009).

The court of appeals also necessarily rejected the district court's conclusion that the possibility that the repatriated funds *might* be invested in government securities in Argentina constituted a commercial use of the funds by the Republic in the United States. As the Second Circuit correctly held, again applying the plain meaning of the statute, "Section 1610(a) does not say that the property in the United States of a foreign state that '*will be used*' or '*could potentially be used*' for a commercial activity in the United States is not immune from attachment or execution. More is required: the property in the United States of a foreign state must be used for a commercial activity in the United States." App. 18a (emphasis in original).[7]

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[7] The Second Circuit found it unnecessary to reach the question whether investment in government securities by a social security administration could ever constitute commercial use by the foreign state. App. 21a. This was an independent ground to reverse and vacate the district court's orders, as the orders were premised on the district court's conclusion that investment of social security funds in Republic-issued debt was somehow improper or abusive. App. 53a, even though the district court recognized that "the provision of social security is a *governmental* function" – i.e., non-commercial – and that "the payment of pensions is something that is required under the Argentine Constitution and under Argentine law, and this is *not* commercial activity." App. 51a-52a (emphases added). In fact, *all* social security systems invest in government debt as a matter of policy, including that of the United States, which is required to invest *entirely* in U.S. treasury instruments. *See* 42 U.S.C. § 401(d) ("investments may be made only in interest-bearing obligations of

Because this holding under the plain language of FSIA Section 1610 was sufficient ground to reverse and vacate the district court's December 11, 2008 opinion and "all of the associated orders," the court of appeals held that it need not address, among other issues, "the propriety of the district court's issuance of the restraining orders prior to the passage of the legislation transferring the funds, when the funds were still the property of the private corporations." App. 22a.[8] Certain of the plaintiffs below now petition this Court to review this question that the court of appeals did not reach, and an antecedent question whether Law 26,425 transferred the social security funds "in situ" to the Republic in New York, which petitioners did not raise below until their unsuccessful request for panel/en banc rehearing, and which contradicts the repatriation argument they previously advanced before the lower courts.

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the United States or in obligations guaranteed as to both principal and interest by the United States")

[8] The court of appeals also held it unnecessary to reach, *inter alia*, whether "the Administration is not a separate 'agency or instrumentality' . . . as we have determined that neither the Administration nor the Republic used the funds for a commercial activity in the United States." App. 21a. However, this does not mean that the district court's erroneous findings were left "undisturbed" by the Second Circuit. EM/NML Br. at 3. To the contrary, the court of appeals vacated all of the district court's orders, App. 22a, which voided them of *any* precedential or persuasive effect. *See, e.g., O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) ("Of necessity our decision vacating the judgment of the [lower court] deprives that court's opinion of precedential effect, leaving this Court's opinion and judgment as the sole law of the case.")

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Court Of Appeals Correctly Applied The Plain Language Of FSIA Section 1610, And The "In Situ" Question Presented By Petitioners Was Not Preserved By Them Below

The plain language of the FSIA compelled the Second Circuit's decision below based on its fact-based determination that the funds targeted for execution by plaintiffs were under the management of the indisputably private AFJPs when the district court restrained and attached the funds, and that neither the Republic nor ANSES "used" the funds before or after the district court's orders. App. 20a. As the court of appeals explained, "[u]nder the plain language of 28 U.S.C. § 1610(a), the funds are immune from attachment" because "the funds *in the hands of the Republic* must have been 'used for a commercial activity'" and the factual record established that they had not been. App. 20a (emphasis in original).

The Second Circuit's holding that the "adoption of a law transferring legal control of the funds" and requiring their repatriation to Argentina did not constitute commercial use by the Republic in the United States, App. 20a, was in accord with Congress's plain language in the FSIA and every other court that has addressed the meaning of Section 1610's "used for commercial activity" exception to immunity from execution. *See* App. 18a ("[T]he property that is subject to attachment and execution must be 'property in the United States of a foreign state' *and* must have been 'used for a commercial activity' *at the time* the

writ of attachment or execution is issued . . . This clearly follows from the plain language of section 1610(a).") (emphasis in original) (citing, *inter alia*, *Conn. Bank of Commerce*, 309 F.3d at 247; *FG Hemisphere Assocs., LLC v. République du Congo*, 455 F.3d 575, 594 (5th Cir. 2006); *EM Ltd. v. Republic of Argentina*, 473 F.3d 463, 481 n.19 (2d Cir. 2007)); *accord Cubic*, 495 F.3d at 1037 ("Because repatriation into a ministry's budget does not constitute commercial activity, we hold that the . . . judgment is not subject to attachment under § 1610(a).").

Contrary to plaintiffs' claim, Pet. at iii & EM/NML Br. at 7, the court of appeals did not decide an issue of "first impression", but made a straightforward ruling in accord with well-settled precedents applying the FSIA's plain language. That plain language authorizes execution against property of a foreign state located in the United States only if the property is "*used for* a commercial activity in the United States" by the foreign state, even if the foreign sovereign has waived its immunity. 28 U.S.C. § 1610(a) (emphasis added).[9] Certiorari would be unwarranted even if the

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[9] Of course, if this *were* an issue of "first impression", which it is not, it would counsel *against* this Court's review, as the Court ordinarily reviews issues only after their development in the lower courts. *See, e.g., Lackey v. Texas*, 514 U.S. 1045 (1995) (Stevens, J., respecting the denial of certiorari) (declining review because "a denial of certiorari on a novel issue will permit the [lower] courts to 'serve as laboratories in which the issue receives further study before it is addressed by this Court'") (citing *McCray v. New York*, 461 U.S. 961, 962-63 (1983) (Stevens, J., respecting the denial of certiorari) (denying certiorari to review issue because "further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issues more wisely at a later date")).

court of appeals had erred in its application of the statutory rule, *see* Sup. Ct. R. 10, much less where, as here, it was plainly correct in its conclusions.

Petitioners do not and cannot claim that the Second Circuit improperly stated the applicable rule of law or created a circuit split when it held that the social security funds at issue are immune from execution under the FSIA because the property was not "used for" a commercial activity in the United States. Instead, plaintiffs principally invoke this Court's decision in *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607 (1992), a case that did not deal with the use of social security funds and, more important, addressed the "in connection with" commercial activity exception to *immunity from jurisdiction* under Section 1605, rather than the considerably narrower and distinct "used for" commercial activity exception to *immunity from execution* under Section 1610. *See, e.g.*, Pet at 18 (citing *Weltover* and other cases applying FSIA Section 1605). As the Second Circuit correctly held, the plain language of the FSIA forecloses any argument that Sections 1605 and 1610 can be conflated, as every lower court to have addressed the issue has recognized App. 17a-18a.

Indeed, post-*Weltover*, this Court held in *Saudi Arabia v. Nelson*, 507 U.S. 348 (1993), that under FSIA Section 1605(a) "Congress manifestly understood there to be a difference between a suit 'based upon' commercial activity and one 'based upon' acts performed '*in connection with*' such activity." *Id.* at 358 (emphasis added). The same reasoning, which properly assumes that Congress chooses its words with care, and uses different words when it wants to mean different things, confirms that Congress likewise

understood the difference between "used for" a commercial activity under Section 1610, and "in connection with" such activity under Section 1605. *See, e.g., KP Permanent Make-Up, Inc v. Lasting Impression I, Inc.*, 543 U.S. 111, 118 (2004) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely.").

Every court to address this issue has confirmed this result, and there is no reason for this Court to review the Second Circuit's application of the well-settled meaning of the FSIA. Contrary to EM/NML's claim, EM/NML Br. at 8-9, the application of the plain language of FSIA Section 1610(a) is *not* an issue that has been confined to disputes in New York courts – an assertion refuted by the Second Circuit's decision itself, which cites identical law from the Fifth Circuit in rejecting the district court's misapplication of the FSIA. App. 17a-20a (collecting cases); *see also Cubic*, 495 F.3d at 1036 ("'used for a commercial activity'" is not the same as "*in connection* with a commercial activity or *in relation* to a commercial activity") (citation omitted, emphasis in original); *Af-Cap, Inc. v Chevron Overseas (Congo) Ltd.*, 475 F.3d 1080, 1085, 1089 (9th Cir. 2007) (although courts may have jurisdiction over suits based upon an act performed in the United States "in connection with" a commercial activity, execution is limited to property "used for" a commercial activity, which is "more specific and narrower"); *Conn. Bank of Commerce*, 309 F.3d at 259 (observing that "the phrase 'used for' . . . [is] nowhere found in the jurisdictional commercial activity exception discussed in *Weltover*"); *Brewer v. Socialist People's Republic of Iraq*, 89 F.2d 97, 100 (8th Cir

1989) (under FSIA scheme "even the victorious plaintiff may only pursue particular property of a foreign state"); *Letelier*, 748 F.2d at 799 (FSIA contemplates the existence of "a right [to jurisdiction] without a remedy [of execution]").[10]

The conceded absence of any circuit split on the unambiguous meaning of the FSIA is not overcome by EM/NML's observation that the Court has granted certiorari in other cases where "the issues involved bear importantly on the conduct of the country's foreign relations and more particularly on the proper role of the Judicial Branch in this sensitive area." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 407 (1964) (quoted by EM/NML Br. at 7). *Sabbatino* involved the pre-FSIA application of the common-law "act of state" doctrine, which trains on the extent to which United States courts should defer to a foreign state's legal enactments or actions within their own territories, remains uncodified and consequentially tends to raise questions about "the proper role of the Judicial Branch" in foreign relations matters otherwise

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[10] Although the plain meaning of "used for" a commercial activity under FSIA Section 1610(a) has been confirmed by several circuits in varying contexts, the precise circumstances here, involving the effect of Argentine legislation reforming Argentina's national social security system, is virtually certain to never recur. *Compare* EM/NML Br. at 7 (citing *Gulf States Utils. Co. v. Fed. Power Comm'n*, 411 U.S. 747, 755 (1973) (granting certiorari to review recurring issue whether the Federal Power Commission must consider the possible anticompetitive effect of a public utility's application under § 204 of the Federal Power Act, 16 U.S.C. § 824c, for authority to issue a security)); *with id.* at 4 (EM/NML asserting that "the petition admittedly raises a question of first impression about the effects of the language of a particular foreign law . . .").

committed by the Constitution to the Executive and Congress. No such concerns are raised by this case, which involves the straightforward application of a statute – 28 U S C § 1610(a) – that expressly limits the courts' execution jurisdiction under the FSIA only to property of a foreign state "in the United States" "used for a commercial activity in the United States."[11] In reversing the district court's failure to apply the plain language of the statute, the Second Circuit enforced "the proper role of the Judicial Branch" prescribed by Congress. The fact that it did so in an area involving, by definition, a foreign state, is hardly a basis for granting certiorari; if it were, the Court's docket would be overwhelmed by FSIA cases [12]

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[11] In *Verlinden BV v Centr Bank of Nigeria*, 461 U S. 480 (1981) (cited by EM/NML Br at 7), this Court recognized that the FSIA embodies Congress's "undisputed power to decide, as a matter of federal law, whether and under what circumstances foreign nations should be amenable to suit in the United States" precisely because "[a]ctions against foreign sovereigns in our courts raise sensitive issues concerning the foreign relations of the United States" *Id.* at 493 Notwithstanding EM/NML's assertion, the Second Circuit did not create "policy" by holding that plaintiffs could not execute against property that the Republic did not "use for" a "commercial activity in the United States," EM/NML Br at 7; to the contrary, the court of appeals applied the plain language of the FSIA requiring that result 28 U S C § 1610(a)

[12] EM/NML's claim that Argentina allegedly has a "long history of default" does not advance their case for a grant of certiorari EM/NML Br at 4, 9 It is more than ironic that their only citation for the contrary suggestion is *EM*, 473 F 3d 463, where this Court *denied* certiorari and the court of appeals *rejected* another attempt by them to execute against property immune under the FSIA *Id*., *cert denied*, 128 S Ct 109. This recent decision not to review issues identical to those raised here – including plaintiffs' flawed argument that FSIA Sections 1605 and 1610 should be conflated

Because petitioners cannot seriously dispute that the Second Circuit applied settled law in its decision, they now advance here a novel legal theory that they did not preserve on appeal – *viz.*, Argentine Law 26,425 transferred the social security funds to ANSES "in situ" in *New York* – and that is directly at odds with their prior position before the lower courts that the Argentine legislation required the property to be repatriated to *Argentina*. *See* Br of Plaintiff-Appellant Aurelius, filed Mar. 18, 2009, at 4, 19, 25, 27, 31 (2d Cir.) (asserting that Law 26,425, requires pension fund assets to be "repatriated" and referring to "repatriation" to Argentina, but failing to assert that the funds were transferred "in situ" in New York). The first time that Aurelius raised its "in situ" theory was in its unsuccessful request for panel and/or en banc rehearing in the Second Circuit. It is well-established, and for good reason, that "[i]t has been the traditional practice of this Court, however, to decline to review claims raised for the first time on rehearing in the court below." *Willis v. Texas*, 511 U.S. 1097 (1994) (O'Connor, J., concurring in the denial of the petition for a writ of certiorari) (citation omitted) ("Following this practice here makes good sense because we do not

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under *Weltover* – further underscores that the questions are not worthy of certiorari. *See Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1321-22 (1994) (Rehnquist, C.J., in chambers) ("We recently denied a petition for certiorari raising this precise issue. Our recent denial demonstrates quite clearly the unlikelihood that four Justices would vote to grant review on this issue.") (citing, *inter alia*, *South Park Indep. Sch. Dist. v. United States*, 453 U.S. 1301, 1304 (1981) (Powell, J., in chambers) (denying stay application because it raised issues "almost identical to those presented three years ago, when the Court voted to deny certiorari")).

have the benefit of a decision analyzing [the issue] to the facts of petitioner's case."); *see also Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (declining to address argument that was "made . . . for the first time in . . response to petitioners' motion for rehearing in the Court of Appeals"; the "failure to raise this issue in a timely manner precludes our consideration").

In any event, even if petitioners had preserved their "in situ" claim below – which they did not – the argument is fully disposed of by the Second Circuit's ruling under the plain language of FSIA Section 1610(a). Even under petitioners' "in situ" theory the only "activity" that the Republic had engaged in with regard to the funds at the time the district court confirmed the orders was the adoption of a law "transferring legal control of the funds from the private corporations to the Administration." App 20a.[13] As the Second Circuit held under the plain language of Section 1610(a), "a sovereign's mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used

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[13] Aside from all other flaws in this argument, it is particularly unworthy of certiorari review on the facts here. The presence of these social security funds in the United States when the relevant Argentine law was enacted in December 2008 was engineered by plaintiffs themselves in persuading the district court in October 2008 (when the social security funds were under the management of the indisputably private AFJPs) to erroneously restrain their transfer. No "activity" or "use" in the United States can be ascribed to any sovereign entity where, as here, plaintiffs themselves caused the funds to be "in situ" when the Argentine law was enacted, nor is this narrow and unique factual setting a suitable one to address this peculiar argument.

for a commercial activity.'" *Id.*[14] This conclusion should hardly be controversial: the exercise of sovereign power to transfer "control" of an asset, which is omnipresent in any state through the condemnation power, for instance, hardly implies that the property will be (or is) "used" for a commercial activity upon the exercise of such power As the Second Circuit correctly noted, such a conclusion "would essentially nullify the Act's commercial activity requirement in cases involving attachment and execution of a foreign state's property." App. 20a Petitioners point to no contrary authority in support of their new "in situ" theory, and there is none.

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[14] The dispositive holding by the court of appeals was therefore that there was no "use" of the funds by the Republic or ANSES. App. 20a ("neither the Administration nor the Republic had the opportunity to use the funds for any commercial activity whatsoever") Plaintiffs' fixation on whether investment for the benefit of social security beneficiaries would qualify as a commercial activity – which the court of appeals explicitly found it unnecessary to reach, App 21a – is therefore beside the point In any event, as the Republic and ANSES demonstrated below, provision of a social security system and investment of the social security funds entrusted to it does not make the property or its use commercial, because *only* social security administrators may make this investment Here, Law 26,425 specifically confirmed existing Argentine law that the social security funds "shall only be used to pay the benefits of the Argentine Integrated Benefit System," Law 26,425, art 8, and the maintenance of a national social security system is a quintessential non-commercial activity. *See* App. 49a (the district court "the provision of social security is a *governmental* function") (emphasis added)

II. The "Procedural" Question Identified By Aurelius Is Also Not Properly Before The Court And Is Likewise Meritless

Petitioners' second question presented – based on its assertion that the Second Circuit "inexplicably misunderstood" the "narrow" nature of the initial restraining orders entered by the district court prior to its decision confirming that the property was executable on December 11, 2008 – is likewise unworthy of certiorari. Pet. ii. In fact, this "procedural" issue, Pet. 24, is fully disposed of by the Second Circuit's explicit holding that it need not reach the impropriety of the pre-December 11, 2008 orders when it vacated the writs of execution in aid of which the earlier orders had been issued. App. 22a ("because we hold that the retirement and pension funds are not property subject to attachment and execution under the Act, we need not address the propriety of the district court's issuance of the restraining orders prior to the passage of the legislation"). This Court does not review issues that a court of appeals found unnecessary to reach. *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, ___ U.S. ___, 129 S. Ct. 1800, 1819 (2009) (this Court declining to address constitutional issues that were not "definitively" ruled on by court of appeals because "[t]his Court . . . is one of final review, 'not of first view'") (citation omitted); *F. Hoffman-La Roche Ltd v. Empagran S.A.*, 542 U.S. 155, 175 (2004) (court of appeals did not address alternative theory of liability presented by the respondents, and therefore

this Court declined to address the argument in the first instance).[15]

Nor is there any merit to plaintiffs' procedural claim in any case: even prior to the passage of Law 26,425, the district court had entered not only restraining orders but also attachments in aid of execution and writs of execution, which are hardly a "narrow" form of relief. *See* App. 27a-31a. Although Sections 1609 and 1610 of the FSIA speak of immunity from "attachment," "arrest," and "execution," this language equally embraces immunity from restraints and *any* other form of judgment enforcement process. *S & S Mach. Co. v. Masinexportimport*, 706 F.2d 411, 418 (2d Cir. 1993) (dissolving injunction restraining "negotiation or use" of property where there was no basis to attach the property under the FSIA); H.R. Rep. No. 94-1487, at 28 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6627 ("The term 'attachment in aid of execution' [in Section 1610(a)] is intended to include attachments, garnishments, and supplemental proceedings available under applicable Federal or State law to obtain satisfaction of a judgment.") Aurelius therefore engages in wordplay when it tries to ascribe significance to the fact that the district court supposedly did not "attach" or authorize "levy" upon the social security funds until March 4, 2009.[16]

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[15] Plaintiffs EM/NML apparently recognize the impropriety of Aurelius's second "Question Presented" and decline to adopt that question in their brief in support of certiorari. EM/NML Br. at i.

[16] In any event, as noted above, Aurelius is flat wrong that the funds were not attached or levied upon prior to March 4, 2009.

The critical point is that FSIA Section 1610(a) requires that property of a foreign state be "used for" commercial activity in the United States by the foreign state before the property is subject to *any* judgment enforcement process. As the Second Circuit held, this is not a procedural "catch-22" as plaintiffs claim, Pet. iv, but is a result of the FSIA's plain language in Section 1610, which embodies Congress' recognition that "execution against a foreign state's property [is] a greater affront to its sovereignty than merely permitting jurisdiction over the merits of an action." *Conn Bank of Commerce*, 309 F 3d at 255 (cited by App. 18a: "'property in the United States of a foreign state' *and* must, have been 'used for a commercial activity' *at the time* the writ of attachment or execution is issued") (emphasis in original)); *see also* App 19a (citing *FG Hemisphere,* 455 F.3d at 594 (holding that "*[p]rior to* issuing a garnishment order, a district court must make factual findings that support application of the § 1610(a) exception to executional immunity") (emphasis added)) [17]

The district court explicitly acknowledged that it authorized plaintiffs to do so when it entered the initial orders in October 2008 *See* App 63a-66a, EM/NML Br at 2 & n.1.

[17] Aurelius similarly cites no authority for its assertion that a federal court's residual equitable power under the All Writs Act can override these limitations imposed by Congress in the FSIA – surely an unworthy basis to seek certiorari review Pet 24 In fact, "where a statute specifically addresses the particular issue at hand, it is that authority . that is controlling Here, Federal Rule of Civil Procedure Rule 65(d) and the FSIA specifically address the issue at hand and thus are controlling " *In re Estate of Ferdinand Marcos Human Rights Litig* , 94 F 3d 539, 545 n 9 (9th Cir 1996) (vacating injunction against foreign state's property "the All Writs Act is a residual source of

Contrary to petitioners' suggestion, the Second Circuit did not hold that the funds were immune *because* of the district court's restraints; rather, as noted, the court of appeals found that the funds were plainly not "used for" a commercial activity under FSIA Section 1610 either before or after the district court improperly restrained the property because the "mere transfer to a governmental entity of legal control over an asset does not qualify the property as being 'used for a commercial activity.'" App. 20a. As demonstrated above, this holding was clearly correct, and even if the questions presented by the petition were properly before this Court – which they are not – the Court should decline review because the well-settled principles applied by the court of appeals are not worthy of certiorari.[18]

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authority to issue writs *that are not otherwise covered by statute*") (citation omitted) (emphasis added)

[18] As noted, there were other independent reasons that also required reversal and vacatur of the district court's orders, which the court of appeals found unnecessary to reach including, *inter alia*, that the Administration is a separate agency or instrumentality whose property (let alone property it administers on behalf of others) is unavailable to satisfy claims against the Republic, and that the administration of funds solely for the benefit of Argentine pensioners and workers is not a "commercial activity" even if such use is by the state itself, which here it is not. *See* App. 21a-22a. That there are several other legal grounds that defeat plaintiffs' claims makes it even less necessary or appropriate for this Court to review the court of appeals' decision. *See* Eugene Gressman *et al.*, *Supreme Court Practice* 504 (9th ed. 2007).

CONCLUSION

The petition for writ of certiorari should be denied.

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